80-1655 No.

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In The

Supreme Court of the United States

October Term, 1980

OSCAR WARING,

Petitioner,

vs.

KALGRAD NAVIGATION COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AVRAM G. ADLER
ADLER, BARISH, LEVIN
AND CRESKOFF
Attorneys for Petitioner
Rohm and Haas Building
Sixth and Market Streets
Philadelphia, Pennsylvania 19106
(215) 923-8900

AVRAM G. ADLER
ANNE E. FIALKOWSKI
On the Brief

4727 LUTZ APPELLATE PRINTERS, INC.
NY (212) 840-9494 • (516) 222-1606 • (914) 683-9363
NJ (201) 257-6850 • PA (215) 563-5587 • DC (202) 783-7288 • MA (617) 227-1133

QUESTION PRESENTED

1. Whether the court may permit receipt of testimony as to longshoremen's violations of OSHA regulations and not charge the jury that the shipowner's scienter of such violations renders the shipowner liable to the longshoremen?

PARTIES

Petitioner in the action is Oscar Waring. Respondent is Kalgrad Navigation Company, Inc.

TABLE OF CONTENTS

Page

Question Presented i

Parties i

Table of Contents ii

Table of Citations iii

Opinions Below 2

Jurisdiction 2

Statutory Provisions Involved 2

Statement of the Case 2

Reasons For Granting the Writ:

The charge by the court that a violation of OSHA regulations by the stevedore as the cause of the accident requires a verdict in favor of the shipowner is an error of law and in conflict with the Court of Appeals for the Ninth Circuit. 8

Conclusion 15

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Bachtel v. Mammouth Bulk Carriers Ltd., 605 F. 2d 438-44 (9th Cir. 1979) 9, 10

Brown v. Ivarans Rederi A/A, 545 F. 2d 854 (C.A. 2 1976). 10

Chavis v. Finnlines, Ltd. O/Y, 576 F. 2d 1072 (C.A. 4 1978) 10

Edmonds v. Compagnie Generale Transatlantique, 61 L. Ed. 2nd 521 (1979) 14

Frasca v. Prudential Grace Lines, 394 F. Supp. 1092 (D. Md. 1975) 13

Gay v. Ocean Transport & Trading, Ltd., 546 F. 2d 1233 (C.A. 5 1977) 10

Griffith v. Wheeling — Pittsburgh Steel Corporation, 610 F. 2d 116 (3rd Cir. 1979) 13

Hite v. Maritime Overseas Corporation, 380 F. Supp. 222 (E.D. Texas 1974) 13

Lawson v. United States, 605 F. 2d 448 (9th Cir. 1979) .. 11

Marshall v. Isthmian Lines, Inc., 334 F. 2d 131 (1964) ... 10

Provenza v. American Export Lines, Inc., 324 F. 2d 660 (4th Cir. 1963) 10

Contents

Page

Reid v. Quebec Paper Sales & Transportation Co., Ltd., 340 F. 2d 34 (1965) 10

Venable v. A/S Det Dorenede Dampskibsselskab, 399 F. 2d 347 (C.A. 4 1968) 10

Statutes Cited:

28 U.S.C. §1254(1) 2

33 U.S.C. §901, et seq. 2, 3

Other Authorities Cited:

29 C.F.R. §1915.43(e) 12

29 C.F.R. §1915.47 12

29 C.F.R. §1915.51(a), (c) 12

29 C.F.R. §1915.54 12

29 C.F.R. §1918.1 4

29 C.F.R. §1918.2 9

29 C.F.R. §1918.32 9

29 C.F.R. §1918.32(b) 7, 9

29 C.F.R. §1918.91(c) 7

§343 of the Restatement of Torts, 2d 13

Contents

Page

APPENDIX

Judgment Order 1a

Denial of Petition for Rehearing 3a

Excerpts of Transcript of Proceedings 4a

No.

In The

Supreme Court of the United States

October Term, 1980

OSCAR WARING,

Petitioner,

vs.

KALGRAD NAVIGATION COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on October 31, 1980 and denial of petition for rehearing en banc on December 8, 1980.

OPINIONS BELOW

No opinion has been filed by any of the courts below. A direct appeal was taken to the United States Court of Appeals for the Third Circuit from the judgment entered in the District Court on the verdict on February 29, 1980. The Court of Appeals for the Third Circuit denied oral argument and affirmed the court below by a per curiam order dated October 31, 1981. A petition for rehearing en banc filed by petitioner was denied on December 8, 1980. The order of the said Court of Appeals affirming the court below and the denial of the petition for rehearing en banc are included in the appendix at pages 1a and 3a respectively.

JURISDICTION

The denial of the petition for rehearing of the order affirming the court below by the United States Court of Appeals for the Third Circuit was entered on December 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provision involved is the Longshoremen and Harbor Workers Act, 33 U.S.C. §901, *et seq.*

STATEMENT OF THE CASE

Petitioner was a longshoreman employed by a contracting stevedore, Delaware Operating Company. He was injured on April 24, 1976 in the Port of Philadelphia aboard the S/S Van Union, a vessel owned and operated by the respondent shipowner.

On January 18, 1978, petitioner filed a complaint in the United States District Court for the Eastern District of Pennsylvania; stating that on April 24, 1976 he was caused to sustain personal injuries by reason of the negligence of Kalgrad Navigation Company ("Kalgrad") while he was working aboard the vessel, the S/S Van Union. The answer of the respondent Kalgrad denied any negligence on its part and alleged that any injuries which the petitioner had sustained were caused by petitioner's own negligence and by the negligence of petitioner's employer, Delaware Operating Company, an independent contractor stevedoring company which had been hired to discharge cargo from the vessel in Philadelphia.

The matter was tried before the United States District Judge Clarence J. Newcomer and a jury. It was tried on all issues including damages. The jury found, the issues having been submitted to the jury on interrogatories, that the respondent was not negligent. The interrogatories provided that upon such a finding the jury need not reach causation or damages. Judgment was entered on the verdict in favor of the respondent on February 29, 1980.

In lieu of filing post-trial motions, petitioner filed a notice of appeal to the Court of Appeals for the Third Circuit on March 26, 1980.

The appeal was grounded upon the charge of the court as to the duty of care of the shipowner under the Longshoremen and Harbor Workers Act, 33 U.S.C. 901, *et seq.* The charge included Section 343 of the Restatement of Torts 2d, a standard that had been previously rejected by the Court of Appeals for the Third Circuit and by the Court of Appeals for the Ninth Circuit as including elements of assumption of the risk. In addition, it was

claimed that the court's receipt of testimony as to OSHA,[1] regulations required a charge from the court that the violation of OSHA regulations by the stevedore does not exculpate the vessel owner. Petitioner claimed that the court erred in not charging that to the extent that the vessel owner had scienter the vessel owner may be found to be negligent by the jury.

The Court of Appeals for the Third Circuit did not afford petitioner oral argument and affirmed the court below by a per curiam order dated October 31, 1981 (1a). Petition for rehearing en banc was denied on December 8, 1980 (3a).

The S/S Van Union, a vessel owned and operated by the respondent, carried the Liberian flag. Respondent is a corporation organized under the laws of Liberia.

On April 24, 1976, the S/S Van Union came into the Port of Philadelphia with steel products, including steel pipe of large diameter. The vessel had been loaded in various ports in Japan with these steel products. Petitioner was a member of the "Lyles" gang which had been assigned to the number 4 hatch of the vessel. Only the forward part of that hatch had cargo. The vessel had no tween deck and consisted of a large general hold from the weather deck down to the floor of the hold.

The cargo in the forward part of the number 4 hold consisted of steel pipe stowed fore and aft on top of beams and other steel products. The Lyles gang of which the petitioner was a member was confronted with a stowage problem that made discharge difficult. No dunnage had been placed between the layers of pipe thus creating a serious hazard. It was necessary to

---

1. Occupational Safety and Health Act of 1970, 29 C.F.R. §1918.1, *et seq.*

bar the pipe to elevate it from its point of rest so that a breakout wire could be placed underneath it. The breakout wire would then be utilized to lift the pipe sufficiently to put a lumber bridle under the pipe in order to take the pipe from the hold to the pier side. The top of the pile of pipe was approximately eleven to twelve feet above the floor of the hold.

Mr. Lyles, the foreman, decided it was necessary to put a forklift truck down in the clear part of the after end of the number 4 hold because absent dunnage it was not possible to bar the pipe apart so as to put breakout wire between it. The forklift truck was utilized by having the forklift come in at a 45-degree angle and, with one blade going underneath the pipe, raising it up to get a strap underneath it.

Mr. Lyles testified that when dunnage was not used, it was customary to have the cargo come in pre-slung, that is, with wire put around the pipe at each end prior to the loading of the steel pipe at the loading port so that neither breakout wire nor bridles would be necessary. However, none of the cargo in the number 4 hatch on April 24, 1976 had been pre-slung.

When rain started a mate was asked to cover the hatches. This was asked so that moisture would not make the steel slippery. The mate, other than some nondescript manual indications, did nothing.

When petitioner was trying to place the bridle underneath a draft of pipe which had been raised by the forklift truck, he was dislodged from the pile by another piece of pipe that started to roll. The petitioner fell some eleven to twelve feet from the top of the pile to the deck of the lower hold in number 4 hatch, and was removed in an unconscious state from the hold to the dock by the use of the ship's derrick.

Mr. Lyles expressed the opinion that the condition of the stow as it came to the Port of Philadelphia from the standpoint of discharging the cargo was not safe. He also testified that a refusal to work and walking off the ship would endanger the longshoremen's jobs. He had utilized the forklift truck to raise the pipe in order to put a breakout wire underneath as his best solution to the dilemma.

Even after the accident, the longshoremen continued to use the forklift truck in the same way.

William Collins, a longshoreman for approximately eighteen years who had covered the entire spectrum of longshore work including gangboss and shipboss, was called by the petitioner as an expert. He had handled cargo similar to that described by Mr. Lyles, both from a discharging and loading aspect. He was asked what were the essentials in stowing cargo such as steel pipe and tubing. Mr. Collins pointed out that among the important factors was the necessity to take the cargo out safely. While he did not approve the use of the forklift truck, he also rejected the alternatives suggested by counsel for the respondent as equally dangerous.

He reiterated the need for either dunnage or a chock to provide a small space to slide in the breakout wire which would then lift the pipe sufficiently high enough to put the necessary bridles around it. Absent dunnage, the only other safe procedure would be pre-slung cargo; that is, cargo already wrapped in wire and slings so that it may be merely hooked up and taken out immediately. He further testified that he had always loaded this type of cargo either in pre-slung condition or by the use of dunnage so that it may be discharged safely at subsequent ports.

Captain Cullen, a Master Mariner was also called as an expert for the petitioner. Captain Cullen testified that the

Master has the ultimate responsibility for the stowage of the cargo aboard the vessel and performs that function through his officers. He pointed out that the primary business of a vessel is to carry cargo from one port to another, and it was therefore concerned with the safe and proper stowage of the cargo. Proper stowage consists of several important elements, the first of which is planning. The planning stage is the amount of thought which goes into loading the cargo, the foremost of which is the safety of the vessel and the safety of the people who are going to work on that vessel and are going to be concerned with the loading and discharging of the cargo.

In the opinion of Captain Cullen, the steel pipe to be discharged in Philadelphia was not reasonably safe, absent the use of dunnage to provide for breakout wires. He summed it up that if dunnage had been used liberally throughout the cargo in the number 4 hatch, it would have provided for a systematic and safe discharge of that cargo by a method that is familiar and consistent with longshoring practices. Without the dunnage, longshoremen were forced to improvise when they used a forklift in order to lift up the pipe bundle to put in breakout wire. Captain Cullen was cross-examined on OSHA regulations and with particularity as to No. 1918.32(b) which was read to him, that "when an edge of a hatch section or of stow cargo more than eight feet high is so exposed that it presents a danger of an employee falling, the edge shall be guarded by a safety net of adequate strength to prevent injury to a falling employee, or by other means providing equal protection under the existing circumstances." He was also cross-examined on OSHA regulation 1918.91(c) which requires that slippery conditions be eliminated as they occur. There had been a contention by the petitioner that the moisture from the rain had made the pipes slippery. Respondent countered with testimony that there was satisfactory dunnage and denied the rain.

Among the experts called by the respondent was Joseph F. McGowan, General Manager of Stevedoring for Delaware Operating Company, who was the petitioner's employer. His offered as an expert testifying on behalf of the respondent. His opinions convicted his own company of unsafe practices by the use of the forklift truck. He also opined that the stevedore was doing the discharging in an unsafe manner.

Cross-examination of Mr. McGowan revealed that he had no hold experience, that he had worked on the wharf, and then as a timekeeper and then went into management. He admitted that he had not been on the S/S Van Union, and that he had not seen the cargo. He admitted that water on naked steel makes it slippery. He admitted that if the pipe got wet he would not under any circumtances dispatch longshoremen to suddenly smear the pipe with Dri-All. He admitted that he would not expect longshoremen to scatter sawdust on the top of the pipes if the pipes had been rained on, but would wait for the pipes to dry. He admitted on cross-examination that loading a vessel is under the control of either the ship's officers or a super cargo, that is, a port captain accompanying the vessel. He admitted on cross-examination that his records indicated that it did rain and that it had rained on April 24, 1976.

REASONS FOR GRANTING THE WRIT

The charge by the court that a violation of OSHA regulations by the stevedore as the cause of the accident requires a verdict in favor of the shipowner is an error of law and in conflict with the Court of Appeals for the Ninth Circuit.

The court permitted testimony *in extenso* regarding the safety and health regulations for longshoring which were characterized as OSHA rules. Petitioner's experts were cross-examined on the activities of the stevedore and whether they

violated the OSHA regulations. Respondent's experts gave their opinion that the activities of the longshoremen did violate the OSHA regulations and it was the violation of the OSHA regulations that was the sole cause of the accident.

The court's charge was explicit on this point:

> "You have heard testimony regarding the safety and health regulations of longshoring. They apply only to stevedoring companies and they are rules, the so-called OSHA rules, which the stevedoring companies such as plaintiff's employer must follow in conducting their work aboard vessels. If you find that plaintiff's employer failed to follow these regulations and that this failure was the sole cause of the accident, then you must find for the defendant."

This charge is contrary to the laws expounded by the Court of Appeals for the Ninth Circuit in *Bachtel v. Mammouth Bulk Carriers Ltd.*, 605 F. 2d 438-44 (9th Cir. 1979),[2] which discussed the precise question of violations by the longshoremen of the requirements of the Safety and Health Regulations for Longshoring (29 C.F.R. §1918.2, *et seq.*).

Involved in that case was the precise code section that was involved in the instant case namely, 29 C.F.R. §1918.32. This section of the code provides:

> "(b) When an edge of a hatch section or of stowed cargo more than 8 feet high is so exposed that is presents a danger of an employee falling, the edge shall be guarded by a safety net or (sic)

2. Petition for certiorari pending

> adequate strength to prevent injury to a falling employee, or by other means providing equal protection under the existing circumstances."

As the court pointed out in *Bachtel* prior to the 1972 amendments to the Longshoremen and Harbor Workers Act, it was well-settled that a violation of the regulations was an indicia of negligence on the part of a vessel owner which if such negligence was a proximate cause of a longshoreman's injuries imposed liability upon the vessel owner. This Court had denied certiorari in *Provenza v. American Export Lines, Inc.*, 324 F. 2d 660 (4th Cir. 1963) and this principle was followed in the Second Circuit in *Reid v. Quebec Paper Sales & Transportation Co., Ltd.*, 340 F. 2d 34 (1965), and in the Fifth Circuit in *Marshall v. Isthmian Lines, Inc.*, 334 F. 2d 131 (1964). *See also, Venable v. A/S Det Dorenede Dampskibsselskab*, 399 F. 2d 347, 353 (C.A. 4, 1968).

The Court of Appeals for the Ninth Circuit then wrestled with the question as to whether or not the enactment of the 1972 amendments changed this doctrine. The court examined the post-amendment cases, *Chavis v. Finnlines, Ltd. O/Y*, 576 F. 2d 1072, 1082 (C.A. 4 1978), *Gay v. Ocean Transport & Trading, Ltd.*, 546 F. 2d 1233 (C.A. 5 1977) and *Brown v. Ivarans Rederi A/A*, 545 F. 2d 854 (C.A. 2 1976), which seemingly support the conclusion that a violation of the regulations cannot be utilized by a longshoreman against a shipowner. The Court of Appeals for the Ninth Circuit in *Bachtel* concluded that these cases are fatally flawed with a basic error and an unwarranted interpretation of the regulations, when it said:

> "Although §1918.2 makes it clear that the regulations do not place *additional responsibilities or duties* on owners, operators, and others, it likewise makes it crystal clear that

> the regulations do not relieve the owners, operators, or masters from responsibilities or duties then placed upon them by law, regulations, or custom. The designing of a 20-30 foot deck load of logs without adequate safeguards at the sides could well have been viewed as evidence of negligence under the *law* as it exists prior to 1972. This design along with the failure to provide protective nets or other devices would be presented to a jury under the customary definition of negligence. That is to say, the regulations here required nothing more than the due care required under the doctrine of negligence as it existed in maritime law prior to 1972.
>
> We must assume that Congress was aware of the *Provenza, Bolenski* and *Venable* decisions, which held that the regulations applied to negligence on the part of the shipowner, at the time it passed the 1972 amendments. The negligence mentioned in 33 U.S.C. §905(b), therefore, would necessarily include a violation of the then existing law and regulations, including §1918.32(b), the subject of the court's instruction challenged by appellant. *See Shapiro v. United States,* 335 U.S. 1, 68 S. Ct. 1375, 92 L. Ed. 1787 (1948); *Allen v. Grand Central Aircraft Co.,* 347 U.S. 535, 74 S. Ct. 745, 98 L. Ed. 933 (1954)." (at 445).

In *Lawson v. United States,* 605 F. 2d 448, 452 (9th Cir. 1979), the Court of Appeals for the Ninth Circuit reiterated its position that a vessel owner is liable for a ship repair contractor's non-compliance with the safety and health

regulations for ship repairing. 29 C.F.R. §1915.43(e), §1915.47, §1915.51(a), (c), and §1915.54. These rules are parallel rules to those relating to longshoremen and the logic is equally applicable.

We have included in the appendix herein at 4a-5a, two pages of the cross-examination of Captain Cullen, an expert witness for the petitioner, which demonstrates the pivotal effect on the jury's questions of the alleged violation of the regulations by the stevedore. The pivotal effect is heightened when the petitioner's employer through its general manager, testifies as an expert for the respondent, and convicts his own company of these violations. The pivotal nature of the charge is also highlighted by the very manner in which the court charged. Despite the fact that interrogatories were submitted requiring the jury to answer seriatim questions as to negligence and causation, the language speaks in the sense of a general verdict.

In the instant case, the OSHA regulations should not have been permitted as a basis for exonerating Kalgrad. The contentions as to the improper stowage and the lack of proper planning made irrelevant any violations of OSHA regulations as exculpatory. It permitted a ground swell of confusion as to the implications of violations of OSHA regulations. Nothing the court charged made clear that the violations of OSHA regulations by a stevedore in attempting to meet a stowage problem does not exculpate the shipowner. It could have served as an independent basis of liability of the shipowner. It could have served as a demonstration that in planning the stowage of the vessel and creating the hazard of which the plaintiff complained, that the vessel owner should have foreseen that the stevedore might violate OSHA regulations. In the context in which it was introduced and the manner in which it was utilized,

the jury was led to believe that if the stevedore violated an OSHA regulation, the vessel owner was thereby insulated from liability.

The charge of the court as to the duty of care of the shipowner was a melange of the new-found standard of care as set forth in *Griffith v. Wheeling — Pittsburgh Steel Corporation,* 610 F. 2d 116 (3rd Cir. 1979) and §343 of the Restatement of Torts, 2d. Petitioner, in its points for charge, asked the court to charge *Griffith v. Wheeling — Pittsburgh Steel Corporation, supra,* and the court so did. The respondent asked the court to charge no. 45 of respondent's points for charge which the court also covered. This point reads:

> "The shipowner is under no duty to warn the stevedore of dangers or defects which are (1) open and obvious or (2) are known to the stevedore or his employees, or (3) which could readily be observed or discovered by said employees in the exercise of ordinary care during the performance of their work. *Hite v. Maritime Overseas Corporation,* 380 F. Supp. 222 (E.D. Texas 1974); *Frasca v. Prundential Grace Lines,* 394 F. Supp. 1092 (D. Md. 1975); *Fisher v. Norships Freighters, Inc.,* 1975 AMC 1622 (E.D. Pa. 1975)."

Hite v. Maritime Overseas Corporation, 380 F. Supp. 222 (E.D. Texas 1974) and *Frasca v. Prudential Grace Lines,* 394 F. Supp. 1092, 1100 (D. Md. 1975) are cited by the respondent in support of their point of charge no. 45 and are pure embodiments of §343 of the Restatement of Torts, 2d.

The *Griffith* court held that the minimum requirement of the reasonable standard of care for a vessel owner is as follows:

> "*At a minimum,* we think that the standard of reasonable care under the circumstances would permit a finding of negligence upon a showing: (1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board ship that led to the injury; (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to the longshoremen working on board ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoremen against that danger. See *Santos v. Scindia Steam Navigation Co.,* 598 F. 2d at 485." At page 126. (emphasis supplied).

It further held that the fact that the stevedore chose a method of operation which may have been negligent, does not relieve the vessel owner of its responsibilities (at page 127).

The fact that the longshoreman may have violated the OSHA regulations is not dispositive of the vessel owner's fault, and, therefore, to charge the jury that if the stevedore were in fact in violation of the OSHA regulations then the shipowner could not be liable, was erroneous as a matter of law.

The charge of the court on OSHA regulations doomed the parallelism deemed by Congress to be necessary for the protection of longshoremen. *Edmonds v. Compagnie Generale Transatlantique,* 61 L. Ed. 2nd 521, 530-31 (1979).

CONCLUSION

In sum total, a longshoreman seriously injured has been impaled upon a violation of OSHA regulations by his employer by a charge that permits such violations to relieve the vessel owner dispute scienter of his parallel duty to take all steps necessary for the safety of those who labor in the service of the vessel.

For the above-stated reasons, it is respectfully prayed that the petition for a writ of certiorari be granted.

Respectfully submitted,

AVRAM G. ADLER
ADLER, BARISH, LEVIN
& CRESKOFF
Attorneys for Petitioner

AVRAM G. ADLER
ANNE E. FIALKOWSKI
On the Brief

APPENDIX

JUDGMENT ORDER

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80-1514

WARING, OSCAR,

Appellant

vs.

KALGRAD NAVIGATION CO., INC.

Appeal from the United States District Court for the Eastern District of Pennsylvania D.C. Civil Action No. 78-0186

Submitted Under Third Circuit Rule 12(6)
October 15, 1980

Before: HUNTER, WEIS, *Circuit Judges,* and FISHER,* *District Judge*

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

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* Honorable Clarkson S. Fisher, Chief Judge, United States District Court for the District of New Jersey, sitting by designation.

Judgment Order

Costs taxed against appellant.

BY THE COURT,

s/ James Hunter, III
JAMES HUNTER, III
Circuit Judge

Attest:

s/ Sally Mrvos
Sally Mrvos, *Clerk*

DATED: Oct. 31, 1980

DENIAL OF PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1514

WARING, OSCAR,

Appellant,

v.

KALGRAD NAVIGATION CO., INC.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ James Hunter, III
Judge

Dated: December 8, 1980

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

[Commencing at p. 4-42]

". . . what other means providing equal protection under existing circumstances would you prescribe? A. I really can't thhink of any. I really can't think of any right now, Mr. Mahoney.

Q. Well, have you ever seen a stevedoring operation in which the stevedore has to discharge a height of steel, bundles of pipe more than 8 feet high? A. Well, no, I have never had experience with a height of pipe like that, as I have said, so I have never seen that operation.

Q. Not 12 feet high but just more than 8. A. More than 8 feet high. No, I don't think so; no.

Q. And it wouldn't make any difference, would it, whether or not there was dunnage between the bundles of pipe, this regulation would still apply as long as the stow was more than 8 feet high, isn't that correct? A. It would be a much safer stow with the dunnage in between the pipes.

Q. That is not what I asked you, Captain. It would not make any difference insofar as this regulation is concerned, would it? A. Not insofar as the written words of the regulations are concerned, no.

Excerpts of Transcript of Proceedings

Q. Well, that is how we perpetuate regulations, is by putting them in written words, don't we, Captain? [4-43] A. Correct, but —

Q. And they are — when the regulation is prescribed, when it's promulgated it has the force of law, does it not? A. Yes, it does.

Q. And it has to be obeyed? A. Yes, it does.

Q. By the stevedore. A. Well, that is what the regulations say; yes.

Q. That is what the regulations say, right.

As a matter of fact, there is another regulation that deals with slippery conditions, is there not? A. Yes.

Q. Do you know what that says? A. No, I can't give you the exact wording of the regulation.

Q. Well, that is 1918.91(c); a section which ddeals with housekeeping, and it says: Slippery conditions shall be eliminated as they occur.

Are you familiar with that wording? A. Yes.

Q. Now, that means that if the stevedore is confronted with the situation where his men must work under conditions which we would describe as slippery, they. . . ."